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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. ——

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

SEMINOLE ROCK & SAND COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Chester Bowles, Price Administrator of the Office of Price Administration, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case entered on November 14, 1944, affirming the decision of the District Court.

OPINIONS BELOW

The oral opinion of the District Court (R. 191–194) has not been reported. The opinion of the Circuit Court of Appeals (R. 202–206) is reported in 145 F. (2d) 482.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944. (R. 207.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

Whether, under Maximum Price Regulation No. 188 (as well as under 46 other maximum price regulations which in the respects here relevant use identical or substantially identical language), a seller's maximum price for a commodity covered by the regulation is the highest price at which he made an actual delivery of the commodity during March, 1942 (in a case in which he did make such a delivery during that month), or whether, as the court below held, the seller is permitted by the Regulation to charge a higher price at which he had merely contracted for delivery in March, 1942.

STATUTE AND REGULATIONS INVOLVED

The statute and regulation involved are Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Supp. III 925 (e)) and Maximum Price Regulation 188 (7 F. R. 5872) issued under Section 2 (a) of that Act.

As originally enacted Section 205 (e) read:

> If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

As amended by Section 108 (b) of the Stabilization Extension Act of 1944 (Public Law 383—78th Cong. approved June 30, 1944) the section provides:

If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates

a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action, for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Section 108 (c) of the Stabilization Extension Act of 1944, *supra*, provides:

> The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of

this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

The pertinent provisions of Maximum Price Regulation No. 188, as amended, which establishes maximum prices for building materials (including crushed stone) and consumer durable goods other than apparel, are as follows:

Sec. 1499.151. *Applicability of the General Maximum Price Regulation.*—The provisions of secs. 1499.1 to 1499.3, inclusive, and sec. 1499.18, of the General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain building materials and of certain consumers' goods set forth in sec. 1499.166, Appendix A, of this Maximum Price Regulation No. 188. All other sections of the General Maximum Price Regulation, together with existing and subsequent amendments and supplementary regulations, shall apply to sales and deliveries by such manufacturers, and are hereby incorporated by reference into this Maximum Price Regulation No. 188.

Sec. 1499.153 (a). *Articles priced in March 1942.*—The maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March 1942 (as defined in Sec. 1499.163), for the article.

Sec. 1499.163 (a) (2). "Highest price charged during March 1942" means

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers. * * *

(4) "Purchaser of the same class" and "class of purchaser" refer to the practice adopted by the seller in setting different prices for commodities for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or under different conditions of sale.

Section 1499.20 (d) of the General Maximum Price Regulation, 7 F. R. 8156, incorporated by refer-

ence into Maximum Price Regulation 188 (see sec. 1499.151, *supra*), reads as follows:

> *Delivered.*—A commodity shall be deemed to have been "delivered" during March 1942, *if during such month it was received by the purchaser* or by any carrier, including a carrier owned or controlled by the seller, for shipment to the purchaser. [Italics supplied.]

STATEMENT

Respondent is a manufacturer of crushed stone and similar commodities subject to Maximum Price Regulation 188. The highest price which it charged for crushed stone actually delivered in March 1942 was 60¢ a ton. (R. 194.) The delivery was made to Seaboard Air Line Railway in pursuance of a contract made the previous fall. After the effective date of Maximum Price Regulation No. 188, respondent sold to the same purchaser for use in the maintenance of its roadbed, 25,239.25 tons at 85¢ a ton and 92,316.15 tons at $1.00 a ton. (R. 194.) The sales were made despite the fact that on July 3, 1942, the Seaboard Air Line Railway had written respondent calling attention to the fact that under the regulations issued by the Office of Price Administration it was unlawful for it to pay to respondent a higher price for crushed stone than the highest price at which respondent sold or offered to sell the same or similar commodity in March 1942 (R. 168), and

that respondent had replied saying: "* * * we beg to advise that the highest price at which we sold ballast in March 1942 was seventy-five cents (75¢) per ton" (R. 169–170).

Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to the Seaboard Air Line Railway was 60¢ a ton, petitioner brought this action to enjoin respondent from violating the Act and regulation and to recover from the defendant a judgment for three times the amount by which the sales prices of the crushed stone sold by the respondent after the effective date of the regulation to the Seaboard Air Line Railway exceeded 60¢ a ton. By way of defense, respondent showed that in January 1942 it had entered into a contract to sell crushed stone to a government contractor at $1.50 a ton to be delivered as called for. (R. 194.) No delivery was made under this contract in March 1942. (R. 195.) A small part of the stone subject to this contract was delivered in January 1942 but the stone so delivered was admitted by respondent not to be the same kind as that sold to the Seaboard. (R. 17–18.) The balance of the stone subject to the contract, which respondent claimed was the same as that sold to the Seaboard, was not delivered until August 1942 (R. 195).

The District Court dismissed the action on the grounds (1) that whatever cause of action ex-

isted to recover a judgment under section 205 (e) of the Act was vested in the purchaser and not in the Administrator, and (2) that $1.50 a ton, the price at which respondent had contracted to sell crushed stone to the government contractor, and not 60 cents a ton, the highest price at which respondent had actually delivered crushed stone in March 1942, was the maximum price at which respondent could lawfully sell that commodity under the regulation (R. 195–196). The Administrator appealed (R. 196).

The Circuit Court of Appeals held that whatever cause of action existed under Sec. 205 (e) because of the alleged over-the-ceiling sales was vested in the Administrator and not in the purchaser, but that the price called for by an executory contract under which the purchaser was entitled to demand delivery in March 1942 was a price charged for delivery in March 1942 within the meaning of Section 1499.163 (a) (2) (i) of the regulation, and that therefore $1.50 a ton and not 60 cents a ton constituted respondent's maximum price for crushed stone under the regulation. (R. 202–206.) Accordingly, it affirmed the judgment of the district court. (R. 207.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the price called for by an executory contract under which the purchaser was

entitled to demand delivery in March 1942 constituted a "price charged for delivery in March 1942" within the meaning of the regulation even though there was no actual delivery under the contract in March 1942.

2. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The primary reason for granting the writ is that the decision of the court below puts in question the correctness of the basis upon which millions of maximum prices have been established. The question here involved, affecting the determination of base-period prices in March 1942, is vital under the General Maximum Price Regulation, issued April 28, 1942, which is still in effect, and under those specialized Price Regulations subsequently issued which, while removing specific commodities from the coverage of the General Maximum Price Regulation, retain the base-period method of determining prices, as distinguished from the establishment of dollars-and-cents ceilings or margin formulas. The regulation here specifically involved, No. 188, is one of these specialized regulations employing the base-period method, of which there are, in all, 47. The commodities covered by them are too numerous to be listed, but it can be said that they include household wares, furniture, household appliances and other consumer durable goods, sixty per cent of

all clothing, solid fuels, virtually all building materials, and countless chemicals, drugs and industrial materials. They comprise over a quarter of all commodities subject to price control.

It is obviously impossible to demonstrate how many sellers of commodities covered by Regulations of the type under consideration may have had offering prices for delivery during March 1942 (or prices fixed in contracts in force in that month under which such deliveries might have been made) that were higher than any prices at which deliveries were actually made during the month. Common knowledge, however, indicates that the number must be very large. New offering prices and new contracts are constantly being made. In March 1942, as the Court will judicially notice, prices were steadily rising. Thus the average of prices on forward-looking offers and contracts was higher than the average of prices on actual deliveries. At the same time the upward surge of prices accentuated the number of new quotations on transactions not yet actually consummated. Where these factors existed, established prices which have been in effect for more than two years have been unsettled by the decision below. If it stands, it will result in higher prices which, though indeterminate in extent and amount, will have serious consequences for the stabilization program.

2. The court below has given a construction to the regulation which is contrary to the carefully

considered, consistent and well-known administrative interpretation. The regulation itself provides in Section 1499.163 (*supra*, p. 6) a succession of three definitions of the "highest price charged by a seller during March 1942". As appears from the face of the section itself, it is only where the first definition is inapplicable that the second is to govern, and only where both the first and the second are inapplicable is the third to govern. The first looks to the "highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942". The second, which looks to the seller's "highest offering price to a purchaser of the same class for delivery of the article or material during that month" is pertinent only "if the seller made no such delivery during March 1942". The court below has permitted a seller to take the second price notwithstanding the fact that the first was applicable since deliveries of the material were actually made in March 1942. Any possible uncertainty regarding the meaning of the section would seem to have been dispelled by the definition of "delivery" in the General Maximum Price Regulation, incorporated by reference into Maximum Price Regulation 188 (see p. 8, *supra*), which requires receipt of the commodity by the purchaser or by a carrier for shipment to the purchaser.

The administrative construction has followed the plain meaning of the provision. Concurrently

with the issuance of the General Maximum Price Regulation, the Administrator distributed a bulletin entitled "What Every Retailer Should Know about the General Maximum Price Regulation", more than a million copies of which were ultimately distributed to the public. On pages 1 and 2 of the bulletin, which was in substantial part applicable and also made available to wholesalers and manufacturers, the following explanation was given concerning the present question (the italics are contained in the original):

> The highest price charged during March 1942 means the highest price which the retailer charged for an article *actually delivered* during that month, or, if he did not make any delivery of that article during March, then his *highest offering price* for delivery of that article during March * * *
>
> Each retailer should apply the following *tests in the order set forth.* If his maximum price can be established for an article under the first test, the retailer need look no further. Only if the price cannot be determined under the first test, may he go on to the second test, and only if it cannot be determined under the first and second tests, may he go on to the third test, and so on.
>
> *First Test: Same Article Delivered in March (Sec. 2 (a) (1))*
>
> *The retailer must take as his maximum price for sales of an article after May 18 the highest price at which he delivered the*

> ***same article during March 1942.*** This is the basic test and the one that will be applicable in the majority of cases. It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling.

While the bulletin deals with the General Maximum Price Regulation, it is equally applicable to Maximum Price Regulation 188. As said by the Emergency Court of Appeals in *United States Gypsum Co.* v. *Brown,* 137 F. (2d) 360, 362, "under both regulations the highest price charged by a manufacturer for any article delivered by him in March, 1942, became his maximum price."

The position thus taken at the beginning has been consistently and repeatedly reaffirmed. The point was deemed to be sufficiently fundamental to be referred to by the Price Administrator in his First Quarterly Report to Congress. In that report the Administrator (at p. 40) explained:

> "Highest price charged" means one of two things: (1) It means the top price for which an article was *delivered* during March 1942, *in completion of a sale* to a purchaser of the same class * * * (2) If there was no *actual delivery* of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month. [Italics supplied.]

Innumerable formal and informal interpretations have been issued to the same effect. Rulings

on the question appear in the manual of interpretations which the Administrator published and distributed in November 1942. Cf. C. C. H. War Law Service, par. 42,403.47 and par. 42,403.48.

The deliberate conclusion of the Price Administrator that prices of actual March deliveries should be the primary basis of maximum prices is supported by abundant reasons. The conclusion was reached only after careful study and in the light of definite and compelling considerations. In the first place, in the interest of certainty and the preservation so far as practicable of current price relationships, a base period of a month was deemed to be the maximum which was feasible. Transactions both before and after that month were, therefore, to be disregarded. In the second place, if mere offers or unconsummated contracts in force during that month were to be taken into account, it would be necessary to consider such intangible factors as the intent and bona fides of the parties, making enforcement difficult and introducing the possibility of easy evasion. Such transactions were, therefore, to be relied upon only in the absence of a definite and consummated delivery. In the third place, and most important of all, establishment of maximum prices on the basis of March delivered prices was necessary to preserve a semblance of the normal spread between prices at the various stages of production and distribution. The General Maximum Price Regulation froze prices simultaneously at all

levels of production and distribution at a time when prices generally were rising. One of the most intractable of the problems in relation to the regulation was the avoidance or minimizing of a "squeeze" resulting from the lag in advancing prices as between one stage of production or distribution and the next. This problem, as it related to the retail industry, was discussed by the Price Administrator in his First Quarterly Report to Congress. What he said disposes of any suggestion that his determination with respect to the issue involved was unreasonable (pp. 43–44):

> Many of the goods sold at retail in March were stocked at an earlier period when wholesale costs were lower than the levels reached in that month. In the case of slow-moving merchandise and seasonal goods, this spread between the prices at which goods have been acquired and the prices at which they can be replaced under the March ceiling is considerable. In the course of time, as retailers are compelled to replace their merchandise, their margins—the spread between their cost of merchandise and their selling price—will be reduced.
>
> * * * * * *
>
> Some relief is provided in these cases by the use of March *delivered* prices in the ceiling regulations, as distinguished from prices *quoted* in March. The use of delivered prices automatically rolls back the squeeze in some degree. This is because goods delivered in March were in many

cases ordered weeks and even months earlier and hence bore the prices that prevailed at the time the orders were placed. It was these prices that the regulation established as maximum, not the quoted March prices.

This delivered price provision was adopted at the suggestion of retailers. Its effect is to roll back the squeeze on a selective basis. The relief resulting from the provision is least where turnover was rapid and inventories were small, that is, in the case in which retail prices were based upon replacement cost and where need for relief is therefore slight. The relief is greatest where turnover was slow and inventories were large, that is, where the difference between inventory and replacement cost is greatest and where the need for relief is acute.

See also the Administrator's Second Quarterly Report, p. 27.

The gravity of a decision thus setting at naught the administrative construction of a price regulation is not confined to the precise clause here involved. Every consideration which underlies the principle of giving effect to administrative construction has special force and exigency where the construction is that of administrative regulations themselves, where elaborate efforts have been made to avoid any uncertainty in their meaning, and where they must be largely self-administered with assurance and uniformity in countless daily business transactions.

3. The court below stated that it would not be "fair and equitable", as required by the statute, to establish a maximum price dependent upon whether a purchaser having a contract at a higher price happened not to require delivery in March (R. 205). To the extent that the decision turns on a conception of unfairness resulting from an element of chance, it is in substantial conflict with decisions of the Emergency Court of Appeals, which has repeatedly recognized that an element of chance is inseparable from any type of regulation which fixes maximum prices at the prices charged in a base period. *Wilson* v. *Brown,* 137 F. (2d) 348; *Northwood Apartments Inc.* v. *Brown,* 137 F. (2d) 809; *United States Gypsum Co.* v. *Brown,* 137 F. (2d) 803. In the light of the considerations already described (*supra,* pp. 16–18), which were dominant in the formulation of the provision in question, the decision below appears to rest on a failure to appreciate the reasons which led to the adoption of the course which the court condemned.

Moreover, in suggesting that the construction which appears plain and which has been consistently adopted by the Administrator would not be fair and equitable under the statute, the court below has entered upon a province reserved for the Emergency Court of Appeals under the statutory provisions for the exclusive jurisdiction of the latter court with respect to questions of the

validity of a regulation. Cf. *Yakus* v. *United States*, 321 U. S. 414.

4. The decision below is inconsistent with that of the District Court for the Eastern District of Illinois in *Bowles* v. *Good Luck Glove Company*, 52 F. Supp. 942, which was affirmed on interlocutory appeal by the Seventh Circuit Court of Appeals, 143 F. (2d) 579.[1] In that case, the court, construing the similar provisions of the General Maximum Price Regulation, refused to accept as applicable the prices on articles delivered in March 1942 because those prices had been fixed under outstanding contracts antedating March by several months. In the present case, the court rejected, as controlling, prices on articles actually delivered in March 1942 for the very reason that there was an outstanding contract fixing a higher price. While the two cases are thus inconsistent, both have adopted a construction at complete variance with the Administrator's. In each case, the court undertook to apply the statutory standard that maximum prices must be generally fair and equitable, and in so doing considered only the individual case rather than the general fairness of the regulation as it has been consistently interpreted by the Administrator.

[1] The case is now pending in the circuit court of appeals on appeal from final judgment, the earlier appeal having been taken from an order denying a preliminary injunction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the case be expedited in this Court.

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JANUARY 1945.

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